NORFAZLIN ZAMANI v. KERAJAAN MALAYSIA & ORS

HIGH COURT MALAYA, SHAH ALAM
JULIE LACK J
[CIVIL SUIT NO: BA-21NCVC-48-08-2019]
19 OCTOBER 2022

Abstract – *Damages serve as a compensation, not as a reward or a punishment. Its primary aim is to put the injured party back, as far as possible, to his or her original position prior to being inflicted with the tortious act that caused him or her damage. Damages therefore, when awarded, must be fair, adequate, not excessive and assessed based on the cogent evidence as adduced by the parties.*

TORT: *Damages – Assessment – Medical negligence – Claim for general, special and aggravated damages – Patient's bladder lacerated during emergency caesarean section operation – Doctors ignored signs of bladder injuries – Portex drain snapped during removal causing 14cm of drain to retain inside patient's abdomen – Patient developed dense adhesions in her abdomen requiring future surgeries – Patient developed antenatal anxiety disorder after recovery – Prolonged recovery period caused loss of income to patient – Patient as full-paying patient denied of her right to be attended by specialist of her choice – Whether damages claimed fair, reasonable and appropriate*

This was a medical negligence claim by the plaintiff against the first defendant, among others, for general, special and aggravated damages. As per the facts, the plaintiff was a patient in the Selayang Hospital who sought to deliver her baby, while the first defendant was the Government of Malaysia. The remaining defendants were the doctors who had attended to the plaintiff at the time of the plaintiff's stay in the Selayang Hospital. Being an aesthetic physician who owned and ran her own clinic, the plaintiff had a busy career. For that reason, she opted to undergo a vaginal birth method as the same would allow her to recover quickly and return back to work as soon as possible. After enquiries to the Selayang Hospital, the plaintiff agreed to subscribe to the hospital's full paying patient scheme ('FPP scheme'). Under the FPP scheme, the plaintiff was offered the vaginal birth method and was allowed to choose the consultant of her choice to attend to her antenatal care and delivery. Believing that she was in good hands, the plaintiff proceeded to give birth at the Selayang Hospital. However, on the day of the delivery, after preliminary round of examinations, the plaintiff's baby showed signs of foetal distress. At that time, for the sake of saving the lives of both the mother and the baby, the plaintiff was required to undergo an emergency caesarean section operation. Much to the plaintiff's consternation however, instead of being operated by 'Dr Philip' who she had chosen, due to his

non-availability, the operation was conducted by one 'Dr Khor Xin Yun' ('second defendant'). The operation carried out by the second defendant successfully gave birth to a healthy baby girl, but, she had also negligently caused lacerations to the plaintiff's bladder. Although during the post-operative period the plaintiff had exhibited haematuria which was a clear sign of bladder injuries, none of the defendants had decided to conduct further investigations into the matter. Only after two agonising pain-filled days had passed would a laparotomy be carried out on the plaintiff. The laparotomy showed that the lacerations on the plaintiff's bladder had caused the urine to leak into the peritoneal cavity and this had already occurred for two days before it was detected. The contaminated fluid, in the amount of 1.3 litres, must be sucked out and cleaned as the same could cause inflammatory reaction to the tissues of peritoneum. The plaintiff's nightmare sadly did not end there. During the procedure to remove a portex drain from the plaintiff's abdomen, one of the defendants had caused the portex drain to snap, leaving a 14cm portion of the drain retained inside the plaintiff's abdomen. A relaparotomy thus had to be conducted on the plaintiff. The fact that the plaintiff had to undergo three different operations in the period of nine days had manifested mental strain, pain and suffering to the same. According to the plaintiff, the defendants' negligence had caused her (i) to spend three months just to recover from her delivery. During the said period, she could not go to work despite being the sole breadwinner of her family. This had put her and her family in financial strain; (ii) to develop a condition termed as antenatal anxiety disorder. Other than developing an aversion to having more children, she had also entertained thoughts of aborting and throwing her baby out of the window during her subsequent pregnancy. This had finally resulted in the plaintiff undergoing a bilateral salpingectomy surgery to remove both of her fallopian tubes, for the sake of not wanting to conceive anymore in the future; and (iii) to form adhesions in her abdomen which in the future could cause health implications. Nevertheless, since the first defendant had admitted liability of being negligent towards the plaintiff, *albeit* delayed, and the parties had recorded a consent judgment, the only issue that arose in the present claim pertained to the quantum of damages to be awarded to the plaintiff.

Held (allowing claim):

(1) The plaintiff had been subjected to considerable amount of pain and suffering for a period of over two days before the defendants took heed of her conditions and conducted the two corrective laparotomies, which should have been unnecessary had they been more alert to the telltale signs of bladder injuries. After considering the physical injuries and psychiatric trauma suffered by the plaintiff and the facts that (i) the plaintiff had to spend 21 days in the hospital before being allowed to return home; (ii) the plaintiff was supposed to have a normal and

uneventful surgery under the care of a gynaecologist of her choice, but was instead put under the care of an inexperienced doctor who later caused injuries to her bladder; and (iii) from the specialist expert report, that there were dense adhesions forming in the plaintiff's abdomen, which in the future had the probability of 18 to 20% chance of developing into bowel adhesions and intestinal obstruction, the sum of RM260,000 was awarded to the plaintiff as general damages for her pain and suffering and loss of amenities of life. (paras 45-51)

(2) There was a high probability that the plaintiff would have to undergo future surgeries to address the development of the dense adhesions. Although it was never specified, taking into account the plaintiff's current age of 39 and by relying on the expert's recommendations and justification, the plaintiff would have to at least undergo the said surgery twice. Since PW1 in his testimony had contended that the cost of the surgery would be in the range of RM30,000 per operation, the plaintiff was awarded RM60,000 as future general damages. The cost awarded would also cover any future pain and suffering as a result of any future treatment or surgery. (paras 52-54 & 57)

(3) The plaintiff's claim for special damages was for (i) hospital and medical expenses; (ii) travelling expenses; (iii) loss of income; (iv) care by family members; and (v) costs of solicitor fees. Firstly, for the hospital and medical expenses, the plaintiff claimed for the sum of RM3,640. Since the amount claimed had not been disputed by the defendants, the amount as claimed by the plaintiff was allowed. Secondly, for travelling expenses, although the defendants argued that the claim was not fully supported by documentary proof, since it was not quite possible for the plaintiff to compile all receipts and bills to support her claim, there was some oral testimony to support the expenses incurred, the amount of RM1,250 was reasonable and the injuries suffered by the plaintiff would have necessitated follow-up treatments, the amount of RM1,250 was allowed. Thirdly, in regard to loss of income, it was evident that the plaintiff, among others, was self-employed, could easily earn RM5,000 per month as an aesthetician and had to recuperate for three months, which was a reasonable period, as a result of the two major surgeries she underwent. Therefore, the amount of RM5,000 per month for three months was allowed. Fourthly, pertaining to care by family members, considering that (a) the plaintiff together with her children had to move into her parents' house; (b) the plaintiff's parents should be compensated for their service of tending to and feeding the newborn baby at night; (c) the family had to hire a helper to assist the plaintiff in her recuperative period; (d) it was not the moral duty of the plaintiff's family members to care for her whenever she fell sick; (e) the loss suffered by the plaintiff was quantifiable; and (f) the amount claimed by the plaintiff,

at the rate of RM833 per month (at the total of RM2,500 for three months), was reasonable and not excessive, such amount was allowed for the plaintiff for this claim. Fifthly, of the claim for costs of solicitor fees, it was agreeable that the case and its preparation had taken a considerable amount of time. Hence, by combining the getting up costs and out-of-pocket expenses, the plaintiff was awarded with a global sum of RM150,000. (paras 58-72)

(4) Despite the defendants knowing of their indefensible negligence, both in causing the bladder injuries and in delaying the remedial surgery, they had not expedited the matter. Instead, there was a prolonged litigation and delayed admission of guilt. Other than that, there were also the facts that (i) no apology had been offered by the defendants for causing the pain and suffering and loss of amenities of life suffered by the plaintiff; (ii) there was a lackadaisical attitude on the part of the defendants in ignoring the plaintiff's complaints of pain and gross haematuria; (iii) there was poor vigilance and technique in the use of the portex drain by the defendants in conducting the second laparotomy, causing the portex drain to snap while it was being pulled out from the plaintiff's body; and (iv) the plaintiff was a full fee-paying patient who was supposed to be attended by a specialist of her choice. However, she was denied of this right and had instead been attended by the second defendant, who was only a medical officer. Due to these reasons, the sum of RM150,000 was reasonable to be awarded to the plaintiff as aggravated damages. (paras 73-82)

(5) For special damages, interest was allowed on 4% per annum from the date of the incident until the date of the judgment. Whereas for general and aggravated damages, interest of 8% per annum from the date of the service of writ until the date of judgment, was allowed. On top of these, an interest of 5% per annum on the judgment sum including cost from the date of the judgment up to the date of full payment was also allowed. (para 83)

Case(s) referred to:

Ahmad Radhiq Arbee Ahmad Rejal Arbee & Ors v. Kerajaan Malaysia & Ors [2020] 1 LNS 702 HC ***(refd)***

Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(refd)***

Hasniyati Hassan & Anor v. Kerajaan Malaysia [2022] 7 CLJ 565 HC ***(refd)***

Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors [2016] 2 CLJ 885 FC ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***

Kalpanadevi Karupaya v. Dr Hassan Mat & Anor (Civil Suit No: 22-1563-06) (Unreported) ***(refd)***

Lee Bang v. Nadzri [1965] 1 LNS 82 HC ***(refd)***

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***

Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(refd)***
Shanmugam Gopal v. Zinal Abidin Nazim & Anor [2003] 8 CLJ 729 HC ***(refd)***
Sheela Christina Nair v. Regency Specialist Hospital Sdn Bhd & Ors [2016] 9 CLJ 267 HC ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Yang Salbiah & Anor v. Jamil Harun [1981] 1 LNS 106 FC ***(refd)***

For the plaintiff - PS Ranjan, Karthi Kanthabalagan & Abdul Azeem Ambalam; M/s PS Ranjan & Co
For the defendant - Natrah Mazman; SFC

Reported by Syamim Ariffin

JUDGMENT

Julie Lack J:

[1] This is a medical negligence claim filed by the plaintiff against the Government of Malaysia who is named as the first defendant in this suit. The first defendant (hereinafter referred to as the defendant) only admitted liability some three years later on 11 February 2022 with damages and costs to be assessed. With that, the parties recorded a consent judgement and the claim against the rest of the defendants were withdrawn.

[2] The trial proceeded only on the issue of assessment of damages and costs.

Background Facts

[3] The plaintiff, who is a medical doctor, underwent an emergency caesarean section at the Selayang Hospital on 28 August 2016. It was supposed to be an uneventful and happy occasion. Sadly, on account of the admitted negligence of the attending doctor, the plaintiff suffered serious bladder injuries. This eventually led to psychiatric issues as a result of the bodily harm caused to the plaintiff.

[4] The plaintiff was 32 years old at the time of the incident and she was expected to deliver her second baby by way of vaginal birth. Seven years previously, she had delivered her first baby by a caesarean section without any complications. She had chosen to have a normal delivery for the second delivery for a number of reasons. Chief of this was due to her busy career. She owns and runs her own practice as an aesthetic physician with her husband as clinic manager. She is the sole doctor in her practice and hence one can appreciate the need for a speedy post-partum recovery in order for her to smoothly and quickly return to work as soon as she was able. A vaginal birth is ideal and would certainly suit her purpose as the recovery rate is rapid.

[5] Hence the plaintiff made inquiries and found what she thought she was looking for. The Selayang Hospital has a maternity section which offers this method of childbirth. And so, after making inquiries, the plaintiff opted to sign up for the full-paying patient scheme (FPP) under the care of Dr VD Philip. One of the attractive features of the FPP scheme is that the patient may choose a consultant of her choice for antenatal care and most importantly, to attend on the patient at the time of delivery. And so, the plaintiff was happy because she particularly chose Dr Phillip as her O&G and therefore held the belief that he would attend to her delivery. Dr Philip is the Head of the Department of Obstetrics and Gynaecology in Selayang Hospital. The plaintiff felt reassured that she was in good hands.

[6] On Sunday, 28 August 2016, the plaintiff experienced labour contractions in the early hours of the morning. She made her way to the hospital and in the preliminary round of examinations was informed that her baby was showing signs of foetal distress. The decision was made at 8.36am of the same day that there was no other avenue to alleviate the problem except to perform an emergency caesarean section in order to save the lives of both mother and baby.

[7] Much to her consternation, she was told that Dr Phillip was not available on weekends and that Dr Khor Xin Yun, a medical officer (second defendant) would be on hand to undertake the operation. The plaintiff was not offered or given any names of other specialists who could handle the operation other than Dr Khor Xin Yun. The plaintiff felt she did not have any choice but to consent to it.

[8] The operation was carried out and the plaintiff delivered a healthy baby girl.

[9] Unfortunately, during the operation, Dr Khor negligently caused lacerations to the plaintiff's bladder.

[10] Immediately during the post-operative period, the plaintiff was noted to have haematuria (blood-stained urine). Any first-year medical officer worth his salt would realise that the presence of haematuria signifies the obvious signs of bladder injury. Unfortunately, none of the medical officers and healthcare givers who attended to the plaintiff after the delivery noted this sign as serious enough to call for further investigations.

[11] In the meantime, the plaintiff was in great pain and all her complaints fell on deaf ears. Her bladder injury was finally detected on 30 August 2016. By then two agonising pain-filled days had passed for the plaintiff.

[12] On 31 August 2016, a laparotomy was carried out. It was reported that iatrogenic (doctor-caused) perforation of the bladder had led to the urine leaking into the peritoneal cavity over a period of two days before it was

detected. It was reported that 1.3 litres of contaminated fluid were found in her peritoneal cavity which had to be sucked out and cleaned with saline solution. This contaminated urine caused an inflammatory reaction to the tissues of the peritoneum.

[13] That was not the end of the plaintiff's nightmare.

[14] On 8 September 2016, during a routine bedside procedure to remove the portex drain from her abdomen by one of the medical officers, the portex drain snapped leaving a 14-centimetre portion of the drain retained inside the plaintiff's abdomen. The plaintiff had to undergo a relaparotomy on the same day for removal of the retained portion of the portex drain.

[15] That was the third operation carried out on her in a matter of about nine days. The physical part of her ordeal may seem to have come to an end. The mental strain of her pain and suffering manifested itself soon after.

[16] In her testimony, the plaintiff stated that she became depressed and anxious during her stay in the hospital. She stated she was not offered any comfort in her pain-filled moments nor was she offered any psychiatric assistance despite being clearly depressed and anxious while she was in the hospital suffering from the complications. Being unable to be with and care for her newborn baby added further to her anguish.

[17] Her recovery was stormy. The plaintiff stated that the injuries caused her a great deal of pain and turmoil. The agony she underwent was so severe that she said she wanted to die if that could stop her pain and the mental anguish she was experiencing.

[18] It took about three months of convalescence for the plaintiff to recover from her injuries. She could not go to her clinic and work during that period. Not being able to work meant that she could not earn a living. Being the sole breadwinner of her family put her under a great deal of financial strain. Apart from that, she was too ill to look after her baby. Her intention of having a speedy recovery so that she could return to work as soon as possible was reduced to ashes. The medical condition she experienced this time around was very much in contrast to her first delivery in 2010 when she was discharged from the hospital one day after her delivery and she was back to work two weeks later.

[19] That trauma of her unhappy experience stayed with her and to her chagrin, the plaintiff became pregnant for the third time in 2018. It was a stressful pregnancy for her and she developed a condition termed as antenatal anxiety disorder. She blamed it on her previous bitter experience during the birth of her second baby at the Selayang Hospital in 2016.

[20] The traumatic experience affected her gravely this time around. It gradually worsened to such an extent that she entertained thoughts of terminating the pregnancy. She approached and spoke to her obstetrician (PW3) and begged to be allowed to abort the baby despite knowing the medical risks and moral consequences of such an act. PW3 who was her attending physician stated in evidence that it was not easy to convince the plaintiff to change her mind.

[21] The plaintiff had the presence of mind to consult a psychiatrist to seek help for her unstable mental sanity. The plaintiff recognised she needed help and thus she consulted Dr Jannah, a psychiatrist from the hospital. The plaintiff frankly admitted that after her third baby was born, thoughts of and the urge of wanting to throw the baby out of the hospital window insidiously crept into her mind. She knew that her past nasty experience during her delivery had resulted in her depression and anxiety.

[22] Due to her bitter experience, the plaintiff stated that she developed an aversion to having any more children. In order to prevent any more unwanted pregnancies, the plaintiff underwent a bilateral salpingectomy. A salpingectomy means a surgery to remove both fallopian tubes. She figured that only in this way would she be assured that she will never inadvertently conceive in the future. Her intention to undergo a salpingectomy was met with initial resistance from the medical personnel attending to her. She was counselled and advised to reconsider her decision as she was too young to take such a drastic measure. The plaintiff was not to be deterred and despite such advice she went ahead and underwent the procedure.

[23] The plaintiff filed this claim on 28 August 2017 against the defendant and 19 of its doctors who had attended to the plaintiff during her stay in the hospital.

[24] In her statement of claim, it was averred that Dr Koh Xin Yun who carried out the caesarean section delivery clearly lacked the training, experience and skills ordinarily possessed of an obstetrics specialist and had caused lacerations to the patient's bladder during the operation. Made worse is when Dr Koh missed the unmistakable signs and symptoms of bladder injury intra-operatively. In the immediate post-operative period, Dr Khor and the other medical officers did not detect haematuria when they so easily could have done so.

[25] The snapping of the portex drain was yet another act of negligence which could very well have been prevented.

[26] PW1, the plaintiff's expert witness, explained that the most likely reason why the portex drain snapped was primarily due to the presence of adhesions forming in her abdominal cavity. He explained that the peritoneal tissues had been contaminated with the urine leaking from the bladder and

had become inflamed and formed adhesions. These adhesions had formed around and clung to the portex drain. Its hardened state around the drain became so tight that it snapped when removal of it was attempted.

[27] The defendants filed their respective statements of defence and the case was managed accordingly. On 10 September 2020, solicitors on both sides exchanged expert reports on liability and causation. Relying on the contents of the medical reports, the plaintiff believed that the defendants did not have expert support to defend the suit.

Admission Of Liability

[28] On 28 September 2020, counsel for the defendant formally wrote to the court to inform that the defendant intended to concede on liability. However, liability was admitted only on 11 February 2022. On the same day, the plaintiff withdrew her claim against the second to 20th defendants and the claim against them was struck out.

The Trial

[29] On the issue of quantum, the plaintiff called the two following witnesses to give evidence:

(i) Dr Thaneemalai Jeeganathan (PW1), the Consultant Obstetrician and Gynaecologist from Thomson Hospital, Kuala Lumpur.

(ii) Dr Maherah Kamaruddin (PW2), a senior clinical lecturer on obstetrics and gynaecology.

[30] The defendant did not call any witnesses. They are of course entitled to do so. But having chosen not to call any witnesses will compel the court to conclude that all the evidence led by the plaintiff must be assumed to be true. Additionally, an adverse inference may be drawn against the defendant for failure to lead evidence (see *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 FC).

Decision On Quantum

[31] The plaintiff claimed for general, special and other reliefs as specified in the statement of claim.

[32] First and foremost, the fundamental principle which needs to be reiterated is that damages serve as a compensation, not as a reward, less still a punishment. Its purpose is only to serve as a compensation to the aggrieved victim of the wrong done to him. In the case of *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885; [2016] 2 MLJ 1, the Federal Court reminded parties at p. 894 this:

> [20] It is trite that damages serve as compensation, not a reward, less still a punishment … In assessing damages, the court should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation. The evaluation of those evidence, which form the basis of any risk of future damage, must therefore still be undertaken. And the trial judge can only evaluate such evidence based on the recognised balance of probabilities standard.

[33] It has always been the consistent stand of courts that damages when awarded must be fair, adequate and not excessive. This was explained in the case of *Yang Salbiah & Anor v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292 at 293, the Federal Court said:

> It must be remembered that the purpose of damages is to try, so far as humanly possible, to put the victim back to the position he would have been in but for the accident. The damages must be fair, adequate and not excessive. A reasoned judgment must therefore be given by the judge, following legal principles and precedents. Other awards in other cases should normally be prayed in aid, but consideration must be given where the circumstances differ.

[34] Hence the aim is to put the injured party back as it were, as far as possible to his original position prior to the tortious act which caused the damage (see *Shanmugam Gopal v. Zinal Abidin Nazim & Anor* [2003] 8 CLJ 729).

Pain And Suffering And Loss Of Amenities Of Life

[35] The expert medical opinion of PW1 can be found at p. 1 of B2.

[36] The expert medical report confirmed that the plaintiff suffered the following injuries:

(i) iatrogenic bladder injury (lacerated bladder);

(ii) haematuria;

(iii) uroperitoneum (urine leaking into peritoneal cavity);

(iv) intraperitoneal fluid collection;

(v) sepsis;

(vi) paralytic ileus;

(vii) dilated bowels;

(viii) severe abdominal pain;

(ix) large and small bowel obstruction;

(x) dense adhesions in abdomen;

(xi) repeated surgeries;

(xii) scarring;

(xiii) post-partum depression; and

(xiv) antenatal depression during subsequent pregnancy.

[37] The following procedures were carried out on the plaintiff:

28 August 2016:	Emergency caesarean section
30 August 2016:	CT scan abdomen and pelvis
31 August 2016:	Emergency laparotomy and repair of bladder injury
8 September 2016:	Relaparotomy and removal of retained abdominal drainage catheter
14 September 2016:	Cystogram and removal of supra pubic catheter.

[38] As can be seen above, the plaintiff underwent a number of procedures including a total of three operations. She was warded for 21 days at the Selayang Hospital.

[39] It is a salient point to note that the plaintiff had been unnecessarily subjected to complications and exacerbation of her injuries as a result of the defendant's negligence. The remedial operations she had to undergo contributed to further pain and suffering which in turn led to her suffering psychiatric problems immediately after the birth of her second baby and again manifested itself during her third pregnancy some two years later.

[40] The plaintiff stated that she developed an aversion to getting pregnant again and she relieved the nightmare that she experienced previously at the birth of her second baby whilst under the care of the medical officers and staff of the Selayang Hospital. It came to a point where she wanted to abort the pregnancy.

[41] Matters did not end there. After the delivery of her third baby, the plaintiff became severely depressed and considered throwing her baby out of the hospital window. In her evidence, the plaintiff stated that her aversion to becoming pregnant again overtook her rationality and she took steps to undergo removal of her fallopian tubes. The plaintiff went against medical advice and in spite of knowing the irreversible nature of such a procedure as she said she did not want to undergo the terrible pain and suffering she went through at the Selayang Hospital.

[42] The traumatic episodes she experienced is substantiated and validated by the defendant's psychiatric expert Dr Ummi Adzlin bt Silim *via* her expert report dated 19 November 2020. Dr Ummi Adzlin diagnosed the plaintiff to be suffering from a severe form of antenatal depression.

[43] In this regard, counsel for the plaintiff proposed that the sum of RM400,000 be awarded as general damages for the pain and suffering and loss of amenities of life suffered by the plaintiff including the psychiatric trauma she experienced. Counsel for the plaintiff had highlighted several precedents/cases to substantiate the claim:

(i) in *Sheela Christina Nair v. Regency Specialist Hospital Sdn Bhd & Ors* [2016] 9 CLJ 267, the plaintiff while undergoing a laparotomy to remove fibroids, suffered perforation of her small intestines due to a negligently performed surgery. The complication was left undiagnosed and she had to undergo a number of repair operations and a prolonged convalescence of pain and suffering. The High Court awarded RM240,000 for pain and suffering and loss of amenities of life.

(ii) in *Kalpanadevi Karupaya v. Dr Hassan Mat & Anor* (Shah Alam High Court Civil Suit No: 22-1563-06), the Court of Appeal increased the award for pain and suffering and loss of amenities of life from RM85,000 to RM200,000. She suffered infection in her abdomen following a negligent operation to remove her appendix.

(iii) in *Hasniyati Hassan & Anor v. Kerajaan Malaysia* [2022] 7 CLJ 565, the High Court awarded the sum of RM300,000 as general damages for pain and suffering and loss of amenities of life. Here, the first plaintiff had suffered, *inter alia,* the loss of her reproductive organs and psychiatric injury.

[44] On the other hand, counsel for the defendant suggested the sum of RM50,000 was sufficient and reasonable but did not cite any case authorities to support that view.

[45] In the circumstances of this case, I took into consideration the physical injuries suffered by the plaintiff and the ensuing pain and suffering as well as the deprivation of the amenities of life resulting thereof. I took note that she was subjected to considerable pain and suffering over a period of two days before the doctors realised and finally took heed of her condition. She then had to undergo two corrective laparotomies which should have been unnecessary if the defendant's officers had been careful and more alert to the telltale signs of bladder injuries she suffered. She spent 21 days in hospital before she was allowed to go back home.

[46] I also took into consideration the psychiatrist trauma she underwent in my assessment of the award for pain and suffering and loss of amenities apart from the physical injuries she suffered. More often than not the taboos involving post, traumatic stress and post-partum depression suffered by a patient after childbirth is a topic not to be mentioned and is swept under the carpet. The plaintiff was supposed to have a normal and uneventful surgery

under the care of the gynaecologist of her choice. But this was not to be. Instead, an inexperienced doctor undertook the caesarean operation which resulted in her suffering bladder injuries.

[47] The specialist expert report has recorded that the plaintiff will in the future encounter other medical issues which will require surgical intervention. PW1 stated in evidence that she will develop dense adhesions within her abdomen. Evidence of this has already manifested itself and this can be seen from the development of very dense adhesions in her abdomen so soon after the laparotomy that was carried out. It was confirmed by the specialist that she had an 18 to 20% chance of developing bowel adhesions and intestinal obstruction in the future.

[48] Accordingly, after having regard to the cases cited and to the particular circumstances of this case, I was of the view that the sum of RM260,000 is a reasonable sum. It takes into consideration the physical injuries she suffered such as the iatrogenic injuries to the plaintiff's bladder, haematuria, sepsis *etc*. Quite apart from that, I also took into consideration the psychiatric effect that took its toll on her.

[49] The closest comparison for the purposes of quantification of an award in my view would be *Hasniyati*'s (*supra*) case. I took into consideration that the plaintiff's injuries are quite similar to *Hasniyati* (*supra*). In *Hasniyati* (*supra*), the plaintiff suffered the loss of her reproductive organs and psychiatric injuries. Even though the plaintiff in the present case chose to rid herself of her reproductive organs, it still nevertheless was as a result of the act of the defendant which drove her to remove any risk of being impregnated again. For a young, intelligent and educated woman of her age, this is an irreplaceable loss and she should be compensated for the loss of her reproductive organs.

[50] In addition, I am also of the view that the compensation for the pain and suffering of the plaintiff must consider the psychiatric and mental anguish she suffered both during the second pregnancy and then later during the third pregnancy.

[51] Keeping in mind all of the above factors and after having reviewed the authorities cited by counsel for the plaintiff, I am satisfied from the range of awards that were suggested, that the sum of RM260,000 is appropriate, reasonable and fair. I assessed that sum to be a fair compensation for both the physical and psychiatric pain and suffering and loss of amenities that the plaintiff has had to endure.

Future General Damages

[52] There is a high probability that the plaintiff will have to undergo future surgeries to address the development of dense adhesions within the abdomen. It was pointed out by PW1 that the dense adhesions had already

begun its insidious stranglehold in her abdomen following her second surgery at the hospital. PW1 confirmed through his specialist report that the plaintiff had an 18% to 20% chance of developing bowel adhesions and intestinal obstruction in the future. The plaintiff will have to undergo surgical intervention to be rid of the adhesions.

[53] PW1 in his testimony stated that the surgical procedures would cost in the range of RM30,000 per operation.

[54] I took note that PW1 did not specify in his evidence the number of times that the plaintiff would have to undergo such surgery. In my consideration, taking into account the age of the plaintiff now (39 years old), she would need to undergo at least two operations. Having considered the expert recommendations and justification explained by PW1, I am satisfied that the plaintiff faces the "possibility, risk, chance or likelihood" of more than one such surgery during her lifetime.

[55] I take into account the fact that the standard of proof of future damages is on a balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss in damages in the future (see *Inas Faiqah* (*supra*)).

[56] I am quite aware that an award for future damages or future care in Malaysia is done on a once and for all assessment basis. The plaintiff cannot come back to the court in the future to claim for any future injuries and losses.

[57] I took into consideration that counsel for the defendant did not challenge PW1 as regards the substantial risk of complications due to the dense abdominal adhesions that the plaintiff has developed and the surgeries she will require in the future. I accept the testimony of PW1 who said the cost of such a surgery will be RM30,000. I was of the opinion that an award of RM60,000 for two future surgeries would be fair and reasonable in the circumstances. This sum also covers any future pain and suffering as a result of future treatment and surgery.

Special Damages

[58] The plaintiff's claim for special damages are for hospital and medical expenses, travelling expense, cost of care, loss of income and costs of solicitors fees.

[59] It is a well-established principle that special damages in contrast to general damages have to be specifically pleaded and strictly proven (see *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300).

[60] It was reaffirmed in *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825:

[34] Special damages are awarded for the plaintiffs' actual pecuniary damage or loss suffered between the date of negligent act and the date when court delivers judgment. Special damages must be pleaded and particularised and must be proved by either oral or documentary evidence …

Hospital And Medical Expenses

[61] The plaintiff incurred the sum of RM3,640 being hospital and medical expenses. The defendant did not dispute this sum and therefore the claim for RM3,640 is allowed.

Travelling Expenses

[62] The plaintiff has pleaded that she spent RM1,254 as travelling and incidental expenses during the course of her hospitalisation at the hospital. The defendant objected to this claim and raised the issue that the amount claimed was not fully supported by documentary proof. It is more often than not quite impossible for the injured party to collect and compile all receipts and bills in order to support the claims made for expenses incurred. In my view as long as there is some oral testimony to support the expenses incurred, a reasonable sum in the view of the court ought to be considered and allowed. Travelling expenses can be expected to be incurred for the plaintiff. Her injuries would have necessitated follow up treatment.

[63] Notwithstanding the absence of receipts, I am in agreement with counsel for the plaintiff that the claim of RM1,250 is reasonable and fair bearing in mind the distance from the plaintiff's home to the hospital.

Loss Of Income

[64] In her testimony, the plaintiff stated that as a result of her injuries, she was unable to go back to work for a period of three months. It was in evidence that the plaintiff was self-employed. Having had to stay away from work to recuperate for three months meant that she could not earn any income for the whole of that duration. It went unchallenged that the plaintiff could easily earn RM5,000 a month as an aesthetician. I have no doubt that the plaintiff was gainfully employed prior to her injuries. It is also reasonable to conclude that she had to recuperate as a result of the two major surgeries that she underwent. I am of the view that the period of three months is a reasonable period for recuperation. Even a working mother in the civil service recovering from a normal delivery would be entitled to a three-month paid maternity leave. Therefore, I do not see any plausible reason why the plaintiff should not be allowed her claim for loss of earnings for a period of three months at the sum of RM5,000 per month.

A **Care By Family Members**

[65] The plaintiff pleaded the sum of RM2,500 as the value of care provided to her by her family during the period she was recovering. The plaintiff testified during the trial that she had to move into her elderly parents' home in order for them to take care of her during her confinement
B as well as to assist in caring for her newborn daughter and her elder daughter who was only seven years old at the time. Without the assistance of her parents, it would not have been possible for the plaintiff to take care of herself as well as the baby. It was also in evidence that the family had to hire a helper to assist the plaintiff during the three months that she was
C recuperating.

[66] The defendant has argued that the court should not allow any award for the value of care given by family members by virtue of the fact that the family members are under a moral duty to care for their loved ones when they fall ill. I do not agree. The loss suffered is the plaintiff's loss and it is
D a sum that is quantifiable. The plaintiff must be compensated for the value of care that family members have provided to the plaintiff when she was unable to care for herself.

[67] In this regard, I am of the view that the pleaded sum of RM2,500 when
E divided into three months works out to only the sum of RM833 per month which is a sum that is very reasonable and not at all excessive.

[68] This amount in my opinion is nowhere near the cost of employing a Filipino or Indonesian maid to care for the plaintiff and her baby. In *Inas Faiqah* (*supra*)) the Federal Court increased the amount from RM300 to
F RM500 per month for the cost of care by parents and a maid. In the instant case, the plaintiff's parents are elderly. Not only did they have to take care of the plaintiff, they also had to care for the newborn baby and another child. Tending to a newborn baby can be very stressful and tiring, especially having to wake up a few times at night for feeding. The parents should be
G compensated for having to provide that service to the plaintiff. I am therefore of the considered opinion that an award of RM2,500 spanning the course of three months would be a very reasonable and fair amount and in accord with other comparable cases.

Getting Up Fee And Out-Of-Pocket Expenses

H **[69]** The plaintiff claimed the following:

(i) getting up fee of RM200,000;

(ii) out-of-pocket expenses of RM13,175.15.

I **[70]** The defendant urged the court to take into consideration that the case only proceeded on the issue of damages since liability was admitted. It shortened the days of trial and the plaintiff only had to call three witnesses. Thus, it was argued that the court should exercise its discretion and only award RM5,000 for getting up costs including out-of-pocket expenses.

[71] I was of the view that RM5,000 as costs was most unreasonable in view of the fact that the plaintiff's solicitors had undertaken significant getting up on liability and quantum in preparation for the claim to be litigated. The delayed admission of liability meant that the plaintiff had to prepare for a full-blown trial.

[72] I have decided to award a global sum combining the getting up costs and out-of-pocket expenses. I consider an award of RM150,000 to be fair and reasonable. I accept and agree with counsel for the plaintiff's submissions that considerable time had been taken up with extensive getting up on liability, causation and quantum, review of medical records, obtaining medical and expert opinions, preparing the claim to be filed, drafting and filing of the various pre-trial case management documents. In *Lee Bang v. Nadzri* [1965] 1 LNS 82; [1965] 2 MLJ 186, Macintyre J stated that where the proceedings in an action have reached a stage when a hearing in open court is inevitable, the legal advisers of the parties are entitled to be in readiness for the hearing and must be compensated for the work done irrespective of whether there was actually a hearing in open court or not.

Aggravated Damages

[73] The plaintiff seeks additional compensation in the form of aggravated damages and has suggested the sum of RM500,000 be awarded mainly for the reason that the defendant had delayed in admitting liability. It was argued that the defendant would have known of its indefensible negligence, both in causing the bladder injuries and in delaying the remedial surgery.

[74] Instead of expediting the matter, there was prolonged litigation and delayed admission of guilt.

[75] The court notes with trepidation that on 28 September 2020, counsel for the defendant wrote to the court seeking a postponement of the commencement of the trial for the reason that the defendant intended to concede on liability and required some time to obtain instructions. A number of trial dates were taken off for the same reason. Finally, the defendant admitted liability on 11 February 2022, some 17 months after the exchange of expert opinion and after PW1 had completed his expert evidence on the stand.

[76] Counsel for the plaintiff regretted that the defendant did not offer any apology for the pain and suffering and loss of amenities suffered by the plaintiff. The mental agony of waiting for the case to be over was further exacerbated with the prolonged litigation taken even though the defendant could have conceded on liability earlier.

[77] It has been confirmed by the Federal Court in the case of *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427 that aggravated damages in addition to general damages can be awarded in cases of medical negligence. In the case of *Ahmad Radhiq Arbee Ahmad Rejal Arbee & Ors v. Kerajaan Malaysia & Ors* [2020] 1 LNS 702, it was held that aggravating features can also include the way the litigation and trial are conducted and that among the chief reasons why courts are inclined to award aggravated damages is when the defendant refuses to admit liability in clear cases and instead file their defence and cause the matter to be set down for trial and protracted.

[78] I find that the conduct of the doctors and nurses in attending to the plaintiff before, during and after her delivery left much to be desired. The lackadaisical attitude of the doctors and nurses in ignoring her complaints of pain and gross haematuria immediately after the caesarean surgery is quite regrettable. In this case, as evidenced by the testimony of PW1, Dr Koh who performed the caesarean surgery should have been alerted to the presence of gross haematuria indicating urological injuries. Any suspicion of urological injuries must be immediately investigated and attended to. Dr Koh missed all the signs and thus caused the plaintiff to suffer agonising abdominal pain for two days before remedial surgery was undertaken. Before that, the plaintiff's complaints of pain were brushed off and ignored. At the material time, Dr Koh was a medical officer with two years of experience. She was not a specialist. Nevertheless, Dr Koh would have known from the clinical notes that the plaintiff had a previous caesarean section, therefore as a medical doctor Dr Koh would realise that there would be an increased risk of injury to the bladder in the process of taking out the baby.

[79] I have no trouble in agreeing that this was an unintentional negligence on the part of the defendant. I however was of the view that the doctors and nurses treating the plaintiff failed in their duty to care and treat the plaintiff diligently. As I have stated earlier, the plaintiff's complaints of abdominal pain were ignored and not attended to. The signs of blood-stained urine were missed by the medical officer and nurses.

[80] To make matters worse, the plaintiff had to again undergo a second laparotomy when the portex drain snapped while it was being pulled out of her body. I have no doubt that it was a result of poor vigilance and technique in the use of the portex drain.

[81] The plaintiff in this case was a full fee-paying patient and had been given to understand that she will be attended to by a specialist of her choice. She had chosen this scheme as it was important for her to achieve a speedy post-partum recovery and return back to work in the most minimal of time possible. She was instead attended to by a medical officer. She was deprived of her right to be attended to by another specialist to undertake the surgery.

[82] In light of the above findings, I am of the view that this was a fit and proper case warranting an award of aggravated damages. I however disagree with the sum of RM500,000 as suggested by counsel for the plaintiff. In my considered view, the sum of RM150,000 is reasonable and more than sufficient to assuage the sense of wrong and harm caused to the plaintiff by the conduct of the defendant.

Interest

[83] I allow interest as follows:

(i) 4% p.a on special damages from date of the incident on 28 August 2016 up to the date of judgment;

(ii) 8% p.a on general damages for the pain and suffering and loss of amenities of life and aggravated damages from the date of service of the writ (1 October 2019) until the date of judgment; and

(iii) 5% p.a on the judgment sum including cost from the date of the judgment up to the date of full payment.